No. 2395

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL NATIONAL FIRE INSURANCE COMPANY, of Chicago, Illinois, a corporation,

Plaintiff in Error,

vs.

WILLIAM BLACK,

Defendant in Error,

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

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Portland, Ore.

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STATEMENT.

This action was commenced in December, 1912, by William Black against the Central National Fire Insurance Company, of Chicago, Illinois, a corporation, in the Superior Court of the State of Washington for Pacific County, and was thereafter, on petition of Plaintiff in Error, removed to the United

States District Court for the Western District of Washington, Southern Division.

The action was brought upon a fire insurance policy, executed and delivered to William Black by Plaintiff in Error on or about the 18th day of June, 1912, and covered a certain stock of liquors, cigars and merchandise kept for sale by William Black in his saloon at Long Beach, Washington. The complaint is as follows:

COMPLAINT.

That plaintiff complains of the defendant above named and alleges:

1. That the defendant is a corporation duly created by and under the laws of the State of Illinois pursuant to an act of the Legislature of said State of Illinois and having its principal office at the city of Chicago in that State.

2. That the plaintiff was the owner of a certain stock of merchandise consisting principally of wines, liquors, cigars, beer and soda and mineral waters kept for sale by him, in the two-story, shingle roof, frame building and adjoining and communicating additions thereto, occupied by plaintiff as a saloon and situated on lot 6, in block 6, of Tinker's north addition to Long Beach, Pacific County, Washington, at the time of its insurance and destruction by fire as hereinafter mentioned.

3. That on the 18th day of June, 1912, at said Long Beach, Washington, in consideration of the payment by the plaintiff to the defendant of the premium of $137.50, the defendant by its agents duly

authorized thereto, made its policy of insurance in writing, a copy of which is annexed hereto, marked Exhibit "A" and by this reference made a part hereof.

4. That on the 27th day of June, 1912, said two-story frame building and the store furniture and fixtures contained therein, together with the plaintiff's above-described stock of merchandise and the goods, wares and merchandise kept for sale by the plaintiff, were totally destroyed by fire.

5. That the plaintiff's loss thereby was Five Thousand Dollars.

6. That on the 23rd day of August, 1912, he, the plaintiff, furnished the defendant with proof of his said loss of said (4) stock of merchandise and otherwise performed all the conditions of said policy on his part.

7. That the defendant has not paid said loss nor any part thereof.

WHEREFORE the plaintiff demands judgment in the sum of Five Thousand Dollars, for his costs in this behalf expended, and such other relief as the Court shall deem appropriate.

The insurance policy contains, among others, the following provisions:

"In consideration of the stipulations herein named and of $137.00 premium, does insure Wm. Black for the term of one year from the 18th day of June, 1912, at noon, to the 18th day of June, 1913, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Dollars, to the following

described property while located and contained as described herein, and not elsewhere, to-wit:

$5000.00 on his stock of merchandise, consisting principally of wines, liquors, cigars, beer, soda and mineral water and all other goods, wares and merchandise not more hazardous kept for sale by assured, while contained in two-story shingle roofed frame building and adjoining and communicating additions thereto, while occupied as saloon and situated on Lot 6, Block 6, Tinker's North Addition to Long Beach, Pacific County, Washington."

The policy contains the following stipulations and conditions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of the like kind and quality; said ascertainment or estimate should be made by the insured and this company, or, if they differ, then by appraisement, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum of which the company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. .....This entire policy shall be void..... in case of any fraud, or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after

a loss.....This policy may be cancelled at any time at the request of the insured, or by the Company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided or become void or cease, the premium having been actually paid, the unearned portion shall be returned upon surrender of this policy of last renewal, this Company retaining the customary short rate, except that when this policy is cancelled by this Company by giving notice, it shall retain only the pro rata premium.....If fire occur, the insured shall give immediate notice of any loss thereby in writing to this Company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and within sixty days after the fire, unless such time be extended in writing by this Company, shall render a statement to this Company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon, and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit

to any person designated by this Company, all that remains of any property herein described, and submit to examinations under oath by any person named by this Company and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this Company, or its representative, and shall permit extracts or copies thereof to be made.

This Company shall not be held to have waived any provisions or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this Company, including an award by appraisers when appraisal has been required.

No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Plaintiff in Error filed its Amended Answer, admitting the execution and delivery of the policy of insurance, but denying plaintiff's loss thereunder was the sum of $5000.00 or any other sum in excess of $1000.00. Defendant's answer also contained three further and separate defenses to plaintiff's complaint.

In defendant's first answer and defense is alleged that on or about the 10th day of September,

1912, and the 9th day of October, 1912, defendant requested and demanded from plaintiff that he produce to this defendant for examination all bills of purchases of stock since his last inventory, or if said bills of purchases had been destroyed then certified copies of the original bills. Defendant also demanded from the plaintiff that he supply and produce to defendant a record of his sales made of stock since the date of his last inventory. This defendant also requested plaintiff on or about said dates to exhibit to this defendant his last authentic inventory taken of his stock, or a certified copy thereof. That plaintiff refused to produce for the examination of this defendant any bills, invoices, or other vouchers of any goods, or certified copies thereof, or any inventory thereof. That all of this defendant's requests and requirements for bills, invoices, vouchers, statements or inventory, or certified copies thereof as above set forth, were refused and denied by plaintiff.

That on the 11th day of October, 1912, plaintiff notified defendant that he would not assist the defendant any further in investigating his said alleged fire loss, and plaintiff then and there stated that as far as he was concerned the matter was then and there ended, and that he would not further perform any of the requirements, agreements, conditions or covenants on his part to be performed under the terms of the policy set forth in plaintiff's complaint.

As a further defense the defendant alleged:

I.

That on or about the 23rd day of August, 1912,

plaintiff furnished and delivered to the defendant an alleged proof of loss in writing, which said alleged proof was subscribed and sworn to by plaintiff before a notary public in and for the State of Washington, residing at Long Beach, Washington.

II.

Plaintiff further alleges that in said alleged proof of loss plaintiff falsely and fraudulently represented to this defendant and set forth that the said plaintiff had on hand in his saloon at the time of said fire, wines, liquors, mineral water and cigars, of the value of $7378.85, which said property plaintiff claimed was covered and insured by said policy. Attached to and forming a part of said alleged proof of loss was a written statement setting forth the value of the items which plaintiff claims were destroyed by said fire, and for which plaintiff claimed the defendant was liable under the terms of said policy. That among the items claimed by plaintiff was an item of five barrels of Old Crow Whiskey, which plaintiff falsely and fraudulently claimed to be of the value of $1000.00. Defendant further alleges that plaintiff did not have on hand the said five barrels of Old Crow Whiskey at the time of said fire, and that five barrels of Old Crow Whiskey would not be of any greater value than the sum of $600.00, all of which the plaintiff well knew. Defendant further alleges that among the items claimed by plaintiff in said alleged proof of loss was an item of four barrels of Cedar Brook McBrayer's Whiskey, which plaintiff claimed were of the value of $800.00. Defendant further alleges that plaintiff did not have on hand at the time of

said fire four barrels of Cedar Brook McBrayer's Whiskey, and that four barrels of Cedar Brook McBrayer's Whiskey at the time of the fire would not have been of any greater value than $300.00, all of which the plaintiff well knew.

Defendant further alleges that among the items claimed by plaintiff in said alleged proof of loss was an item of three barrels of Green River Whiskey, which plaintiff claimed were of the value of $750.00; that plaintiff did not have said property on hand at the time of said fire, that said property was not destroyed by said fire, and that three barrels of Green River Whiskey at the time of said fire would not be of any greater value than $400.00.

That plaintiff's alleged proof of loss contained among other items the following:

3	Barrels Penwick Rye (1904)	$400.00
3	Barrels Penwick Rye (2 not tapped)	400.00
1	Barrel Old Crow Whiskey (s Gallons drawn)	350.00
1	Barrel Fox Mountain Whiskey	400.00
2	Barrels A. G. McBrayer's Whiskey	300.00
1	Barrel Wictlow Whiskey	125.00
1	Barrel California Port Wine	75.00
1½	Barrels Hudson Bay Rum	50.00
2	Barrels Clark Bros.' Whiskey	214.35
1000	Attention Cigars	35.00
900	Y. & B. Cigars	81.00
500	Van Dyke Cigars	45.00
1600	Optimo Cigars	144.00
100	Carabano Cigars	9.00
500	Alhambra Cigars	17.50
500	Gato Cigars	40.00

1½ Barrels Imported Port Wine..... 75.00
1½ Barrels California Brandy..... 40.00

Defendant further alleges that the plaintiff did not have the above mentioned items of merchandise among his stock of goods on hand at the time of the fire; that the above items of merchandise were not destroyed by said fire, and that plaintiff falsely and fraudulently represented to this defendant, for the purpose of defrauding this defendant, that said items of merchandise were among the stock of goods destroyed by said fire and were on hand for the plaintiff.

IV.

Defendant further alleges that plaintiff well knew at the time he delivered to this defendant his alleged proof of loss that the above items of merchandise were not of the value claimed by him, even if they had been on hand and among plaintiff's stock and destroyed by said fire. Defendant further alleges that plaintiff falsely and fraudulently claimed and represented to this defendant that the above items of goods were of values as above mentioned, whereas said items of goods were of great deal less value than the amounts claimed thereon, all of which was well known to the plaintiff. That plaintiff falsely and fraudulently represented to this defendant in said alleged proof of loss that his stock of goods destroyed by said fire was of the reasonable value of $7,378.85, whereas said stock of goods was not of said value and was not at the time of its destruction by fire of any greater value than $1,000.00. That plaintiff claimed in said alleged proof of loss payment for various other items

of liquors which were not on hand or among his stock of goods destroyed, for the purpose of defrauding this defendant. Defendant further alleges that said alleged proof of loss contained items of merchandise not covered by said policy and not within the terms thereof, all of which plaintiff well knew, and that plaintiff made claim for the above mentioned items of goods from this defendant for the purpose of defrauding this defendant, and plaintiff falsely and fraudulently represented to this defendant that they were among the stock of goods destroyed by said fire.

As a further and separate defense defendant alleged:

I.

That on or about the 27th day of June, 1912, the building described in said policy was destroyed by fire, together with whatever stock of liquors, wines and cigars, plaintiff had on hand in said building at the time of said fire, which said fire was caused by the act, design or procurement of the plaintiff, and not otherwise; that by reason thereof said policy is void and of no effect and this defendant is not liable thereunder.

Thereafter Defendant in Error filed his reply to said Amended Answer, which reply is as follows:

I.

Replying to the second paragraph of the first affirmative defense as contained in said answer, the plaintiff alleges and avers the fact to be that he gave to said defendant, its agents and servants, all

information in his possession concerning the amount of loss sustained by him under the policy sued on; that all of the invoices and the inventory of the stock of goods so contained in the building described in said policy of insurance were destroyed by fire, and it was impossible for plaintiff to produce the originals of the invoices and inventory, but said plaintiff did furnish to said defendant, its agents and servants, the names and addresses of all persons, firms and corporations with whom plaintiff had bought goods, so as to enable the said defendant, its agents and attorneys, to ascertain for themselves the extent of plaintiff's loss under said policy. The plaintiff denies that the request of defendant for bills, invoices, vouchers, statements or inventory or certified copies thereof were refused and denied by this plaintiff, but, on the contrary, the plaintiff alleges and avers the fact to be that he did everything within his power to comply with the terms and stipulations contained in said policy of insurance and with the demands and requests made by said defendant, its officers, agents and servants, for information concerning the extent of the plaintiff's said loss.

II.

For reply to the third paragraph of the first affirmative defense, as contained in said answer, the plaintiff denies the same, the whole and every part thereof, and each and every allegation therein contained.

For reply to the second affirmative defense, as contained in said answer, the plaintiff says:

I.

For reply to the second paragraph thereof, he admits that the proof of loss which he furnished to said defendant disclosed that at the time of the fire plaintiff had on hand wines, liquors, mineral water, cigars and other articles of personal property of the value of Seventy-three Hundred Seventy-eight and 85-100 ($7378.85) Dollars; admits that among the items of personal property plaintiff claims was destroyed was five (5) barrels of "Old Crow" whiskey, which plaintiff claimed and verily believes was of the value of the sum of One Thousand ($1000) Dollars, which whiskey the plaintiff avers and alleges that he had on hand at the time of said fire and which was destroyed therein; plaintiff admits that said proof of loss set forth the items of personal property mentioned and described in paragraph two (2) of the second affirmative defense, as contained in said answer, all of which were on hand at the time of said fire and which plaintiff, at the time of making proof of loss, verily believed to be of the value represented by him in his proof of loss so made to the defendant company.

II.

Replying to the third paragraph of said second affirmative defense, plaintiff denies the same, the whole and every part thereof and each and every allegation therein contained.

III.

For reply to the matters and things contained in paragraph four (4) of the second affirmative

defense as contained in the amended answer, plaintiff denies that he made any false representations whatsoever concerning the value of the goods so destroyed by fire which plaintiff claims were covered by said policy of insurance, and denies that he made any false or fraudulent statements as to the items of goods of personal property so destroyed by fire, and he denies that in his proof of loss he falsely and fraudulently or at all made any false representations to the said defendant concerning the stock of goods so destroyed by fire; plaintiff denies that said stock of goods was not of any greater value than One Thousand ($1000) Dollars at the time of its destruction by fire, and alleges the fact to be that it was of the approximate value of Seventy-three Hundred Seventy-eight and 85-100 ($7378.85) Dollars. Plaintiff further alleges and avers the fact to be that the proof of loss so made out and sent to the defendant insurance company was wholly written, made out and constructed by Henry Kayler, the agent of said defendant, at Long Beach, in the State of Washington, and that if said proof of loss contained any items of merchandise or personal property not covered by said insurance, the same was not due to any fault or design on the part of the said plaintiff to in any manner defraud or deceive the said defendant company, but that said plaintiff wholly relied upon the said Henry Kayler, the agent of the said defendent insurance company, to properly make out said proof of loss and to include therein such items of personal property only as was covered by said policy of insurance, and plaitiff avers and alleges the fact to be on information and belief that if the said Kayler, the agent of said defendant, did include in said proof of loss

any items of personal property not covered by said policy of insurance, that the same was done without any design on the part of the said Kayler to defraud said insurance company, and plaintiff further avers and alleges the fact to be that in the making out of said proof of loss the said Kayler was acting for and on behalf of the defendant insurance company and not for and on behalf of this plaintiff.

IV.

For reply to the fifth paragraph of the second affirmative defense as contained in said amended answer, plaintiff admits that the policy of insurance upon which this action is brought provides among other things in case of any fraudulent or false swearing by the insured in the respects set out in said paragraph, that the policy becomes void, but plaintiff avers and alleges the fact to be that he has never been guilty of any false swearing or of any attempt to defraud the said defendant.

For reply to the third affirmative defense as contained in said answer, the plaintiff denied that the fire was caused by his act, procurement or design.

After said cause was at issue Plaintiff in Error propounded forty-two written interrogatories to William Black, pursuant to Section 1226 of Remington & Ballinger's Annotated Codes & Statutes of the State of Washington. Said Interrogatories were filed in the United States District Court upon the 13th day of May, 1913, and on the 2nd day of June, 1913, William Black filed his answers thereto in writing which answers were subscribed and

sworn to before a Notary Public. (See Vol. 1 of transcript, pages 38 to 62.)

At the trial of the cause it was contended by Plaintiff in Error that Black's stock of merchandise, wines, liquors, cigars, etc., was very small and was worth less than the sum of $1000.00; that the policy was void by reason of the failure of Defendant in Error to furnish the Insurance Company with his last authentic inventory and certified copies of his invoices, bills of purchase, etc. That Defendant in Error had been guilty of false and fraudulent swearing in connection with his loss and that the fire originated by the act, procurement or design of the Defendant in Error.

Upon the issues thus made the trial of this cause was begun before the Court on the 21st day of October, 1913, and continued from day to day until the 24th day of October, 1913, when the jury in said cause returned a verdict in favor of William Black and against the Central National Fire Insurance Company for the sum of $5000.00. On the 30th day of October, 1913, a judgment in favor of the plaintiff and against the defendant on said verdict was entered by the Court for the sum of $5000.00 with interest thereon at the rate of 6 per cent per annum from the 6th day of December, 1912, together with costs and disbursements taxed at $210.50.

Thereafter and on the 15th day of November, 1913, and within the time allowed by law and the orders of the Court, the defendant filed its motion for a new trial, which was over-ruled on the 1st day of December, 1913, and on the 8th day of January, 1914, and within the time allowed by law and the orders of the Court, the Plaintiff in Error tendered

to the Court its Bill of Exceptions, and the same was then settled and allowed and made a part of the record in this cause.

On the 27th day of January, 1914, the Insurance Company filed its petition for Writ of Error and therewith its Assignment of Errors, and thereafter a Writ of Error in said cause was duly issued. Plaintiff in Error, upon its Writ of Error, relies upon the following Assignment of Errors:

ASSIGNMENT OF ERRORS.

I.

Said District Court erred in overruling the objections of the defendant to the following question propounded by counsel for plaintiff to the witness, S. A. Madge:

Q. Just tell the jury what kind and character of stock of liquors Mr. Black kept on hand.

To which counsel for the defendant objected on the ground that it was not close enough unless shown to be immediately preceding the fire, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed. Said witness having previously testified that he resided at Olympia; had been in the insurance business for about five years; had been deputy collector of internal revenue; had not been in Black's saloon since 1908. (Transcript 470-471.)

II.

Said District Court erred in overruling defendant's motion to strike out the testimony of the wit-

ness, S. A. Madge, to which ruling of the Court defendant excepted, and which exception was then and there allowed; said witness having previously given the following testimony:

I ceased to be deputy collector of internal revenue just about five years ago. I was in his place of business at Long Beach once or twice before I went out of the service. It was about five years ago. I was in his place of business at Ilwaco, also in his place of business after he moved to Long Beach. I visited his place of business in my official capacity as deputy collector of internal revenue. The stock of goods that he carried in Ilwaco, I remember very distinctly. I do not remember so distinctly about the stock of goods at Long Beach after he moved up there, but my impression is that it was the same stock of goods as the saloon in Ilwaco. It was a small town, and I was impressed with the stock of goods that he carried, because it was so far beyond the class of goods that are kept in saloons in towns of that size, that I made an inquiry, I think, and some investigation to find out why he was carrying a stock which was all double stamped goods; double stamped goods are straight distillery goods. He carried a very high grade of liquors, Old Crow, Hermitage, Penwick Rye, and that class of goods. I think he had one barrel that ran up to 120 proof; a very high grade of goods, and he had quite a stock of it. It was in barrels, and the barrels were racked up and the barrels were all tapped. I tested quite a bit of it, because I felt it was my duty to do so on account of the size of the town, but he gave me a very reasonable explanation of why he carried that class of goods in his place.

He had some very old liquors, reimported goods; reimported goods are goods that are taken across the water and brought back here to increase the quality of the liquor. Old Crow, three years old, when it would be put out of bond, would cost in the neighborhood of three to four and a half a gallon, that is the younger age. Six or seven years old, it would be worth seven to ten a gallon. If ten years old it is worth seven, some of it ten. Liquor that is six years old would be worth five or six a gallon. It is a lot owing to the amount of absorption and the amount of liquor lost. Some barrels will char quicker than others and the proof will run up higher; that means there is a loss of quantity in the barrel and a higher proof. Mr. Black's saloon is a higher class of saloon than the general run. He had quite a large supply of liquors. I think he kept a pretty fair supply of cigars, that is my impression. Rectified goods are compounded goods. Certain wholesalers and rectifiers have a license to rectify goods, and they take alcohol and Green River whiskey and mix them together, putting water in and bring the proof down to about sixty or eighty-five, somewhere along there, and put coloring matter in there, and sometimes caramel, to give it a mellow taste. I do not think he had a single bit of rectified goods in his place. I think all of his goods were bottled in bond. They are bottled under Government supervision at the bonded warehouses at the distilleries, and they are bottled at 100 proof and the Government stamp is put over the cork. There is a very heavy penalty for refilling any of these bottles. It is our duty to see that none of these bottles are refilled. These liquors I spoke of were in Mr. Black's saloon in Ilwaco. I was in Mr.

Black's saloon the last time about five years ago. I was in his saloon only once after he moved to Long Beach, that was in 1908.

(Transcript 471-472.)

III.

Said District Court erred in overruling the objection of the defendant to the following question propounded by counsel for plaintiff to the witness, S. A. Madge.

Q. For instance, if a person kept that for several years, supposing he got a barrel of these double stamped goods in 1903, and it cost three or four and a half a gallon, what would be its value six or seven years later?

To which counsel for the defendant objected on the ground that the witness was not qualified to give testimony as to the value of liquor, which objection was overruled, to which ruling the defendant excepted, and the exception was then and there allowed.

(Transcript 473.)

IV.

Said District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to the witness, S. A. Madge.

Q. Do you know what they cost per gallon, barrel, etc.?

A. Well, Old Crow would cost in the neighborhood of three year old, when it would be put out of bond, would cost in the neighborhood of three to four and a half a gallon, that is the younger age.

Counsel for defendant moved that said answer be stricken out for the reason that said witness was not qualified; which motion was denied by the Court, to which ruling the defendant then and there excepted, which exception was allowed.

(Transcript 474.)

V.

Said District Court erred upon the trial of said cause, in permitting counsel for the plaintiff to offer, and in admitting over the objection and exception of the defendant, plaintiff's alleged proof of loss (Plaintiff's Exhibit 3), which was objected to by the defendant for the reason that it contained property not covered by the policy, and on the further ground that it contained a gross and exaggerated value of the property, and was not such a proof of loss as is required by the terms of the policy, which exhibit is as follows:

Wm. Black vs. Central National Fire Insurance Co.

Plaintiff's Exhibit 3.

INVENTORY ATTACHED TO AND BEING PART OF BULK LIQUORS ON HAND, PROOF OF LOSS, UNBROKEN PACKAGES.

5 bbls. Old Crow, Jan. 2, 1906, 1 bbl. tapped, 1 gal. sold.....$1000.00

4	bbls. Cedar Brook McBrayer, 1903, not tapped	800.00
3	bbls. Green River, 1902, untapped	750.00
3	bbls. Penryck, 1904, 2 bbls. not tapped.	400.00
1	bbl. Old Crow, 1899, 2 gals. drawn	350.00
1	bbl. Fox Mountain, 1896, not tapped.	400.00
2	bbls. A. G. McBrayer's single stamp, 1 bbl. not tapped	300.00
1	bbl. Wicklow	125.00
1	bbl. California Port Wine	75.00
1½	bbls. Imported Port Wine, 16 gall.	75.00
1½	bbls. California Brandy, 16 gall.	40.00
1½	bbls. Rum, Hudson Bay	50.00
4	gall. Gin Box. jug	9.00
5	cases Whiskey, flasks	20.00
2	bbls. Clark Bros.' Whiskey, untapped.	214.35
1000	Attention Cigars	35.00
500	Alhambra Cigars	17.00
5	bbls. Bottled Beer	47.50
900	Y. & B. Cigars	81.00
800	El Rayo	72.00
500	Gato	45.00
1600	Optimos	144.00
500	Van Dyke	45.00
100	Carabana	9.00
100	Loveras	9.00
200	Carletons	12.00
200	Eschelles	12.00
800	Manila	40.00
7	Boxes Egyptian Cigarettes	7.00
1	box Egyptian Luxury Cigarettes	2.50
1	box Pall Mall Imported	2.50
		$5,189.35

5 cases Joe Gideon Whiskey.....	$ 62.50
15 cases Joel B. Frazier, 8 bottles in show case	180.00
22 cases Roxbury Rye, 7 bottles in show case	220.00
4 cases Guggenheimer, 5 bottles in show case	40.00
4 cases Old Crow Bourbon, 9 bottles in show case	50.00
4 cases Hermitage, 6 bottles in show case	50.00
4 cases Gibson Rye, 3 bottles in show case	40.00
2 cases Pebble Ford, 8 bottles in show case	25.00
2 cases McBrayer, 9 bottles in show case.	27.00
1 case Cyrus Noble, 4 bottles in show case	14.00
3 cases Atherton, 9 bottles in show case..	40.00
4 cases W. H. Lacey.....	40.00
2 cases Yellowstone	25.00
2 cases Holland Gin, Imp., 14 bottles in show case	45.00
2 cases Gordon, 9 bottles in show case....	30.00
2 cases Martelle Brandy, 6 bottles in show case	40.00
2 cases J. Hennesy, 9 bottles in show case	36.00
4 cases Sazarae, 3 bottles in show case..	50.00
2 cases Scotch Whiskey, 10 bottles in show case	30.00
1 case Old Curio	20.00
4 cases Sloe Gin	40.00
1 case Jamaica Rum	14.00
2 cases Canadian Club Whiskey, 7 bottles in show case	17.50
1 case Mountain Dew Scotch.....	14.00
3 cases Italian Vermouth	24.00
1 case French	9.00

2 cases Maraschino Cherries	12.00
2 cases Rock & Rye	14.00
2 cases Pineapple Rock & Rye	20.00
	$1,166.50

1 case Benedictine, Imp.	$ 35.00
6 bottles Creme de Menthe, Imp.	12.00
6 bottles Creme de Cocoa	12.00
1 bottle Picon	2.00
2 bottles Boonekamp Bitters	2.00
2 cases Claret Wine	9.00
2 cases Muscat	9.00
2 cases Angelica	9.00
2 cases Madeira	9.00
2 cases Sherry	9.00
2 cases Tokay	9.00
4 cases Cresta Blanca-Margam	36.00
2 cases Sparkling Burgundy, pts.	26.00
2 cases Sparkling Burgundy, qts.	26.00
3 cases Mont Rouge-Sauterne	30.00
2 cases Mont Rouge-Burgundy	24.00
6 dozen Beer Glasses	12.00
2 dozen Water Glasses	2.75
5 dozen Whiskey Glasses	8.00
2 sets Measures, Copper	12.00
2 sets Funnels	12.00
8 dozen Bar and Glass Towels	24.00
8 dozen Decanters	8.00
25 gross Corks, all sizes	4.00
	$353.75

4	dozen 1 gal. Demijohns	$ 20.00
5	dozen ½ gal. Demijohns	15.00
2	dozen Champagne Glasses	4.00
2	dozen Port Wine	3.00
2	dozen Brandy	3.00
2	dozen Cocktail	3.00
2	dozen Vermouth	3.00
2	dozen Benedictine	3.00
3	cases Sauterne Van Schuyver	13.50
2	cases Old Tom Gin, J. W. Nicholson, Imp.	22.50
2	cases Lash Bitters	16.00
1	case Ginger Brandy	8.00
2	cases Virginia Dare Wine	12.00
1	case Lyon's Cocktails	12.00
1	case Mumm's Champagne	37.00
1	can Alcohol, 4¾ gall	12.00
2	cases Damiana Bitters	16.00
1	drum Bass's Ale, Imported	16.00
1	case Stout, Imported	14.00
2	bbls. Budweiser Beer, qts	25.00
28	bottles Lock Wine	11.00
1	qt. Jamaica Ginger	1.50
1	qt. Essence Peppermint	1.50
2	cases White Rock Mineral Water	17.00
1	case Bartlett Mineral Water	8.50
1	bbl. Soda Water	8.50
1	bbl. Ginger Ale	8.50
5	bbls. Weinhard Bottled Beer	45.00
2	cases Grape Juice, large size	9.00
		$320.50
1	bbl. Mellwood Whiskey, about 15 gall.	$ 37.50
1	keg Mellwood Whiskey, about 3 gall.	7.50

1	keg Old Crow Whiskey, about 2½ gall..	6.25
20	bottles various liquors on back bar.....	25.00
126	bottles in show cases, aver. $1.25 per bottle	157.50
6	broken boxes cigars, about 300, aver. $75 per M.	22.50
	Cordials, Mineral Waters, Soda Waters, Beer and Ales in back bar.....	30.00
20	gall. Blackberry Brandy.....	50.00
1	gall. Dry Sherry, $1.25 per gall.....	12.50
		$348.75

For further information in regard to value of the different whiskey would refer you to the Internal Revenue offices at Tacoma, also Mr. Locke, of the firm of Greenbaum Bros., Louisville, Kentucky, residing at 1130 Hawthorne Ave., Portland, Julius Friedman, of Blumauer & Hock, and Mr. Adams, of Fleckenstein & Son, Frank Botsfuhe (?), and Julius Wellman, of Brown, Forman & Co. As to cigars, I bought of Mason, Ehrman & Co., Gunst & Co., Hart Cigar Co., Taylor, of Astoria, representing Sohbacker & Co. If necessary, will furnish sworn affidavits from above people and other prominent persons, who are familiar with my stock, as I wish you to understand that I desire the fullest investigation. That I have nothing to conceal and can substantiate everything that is stated in above inventory.

Remaining

Yours respectfully,

Wm. Black.

No. of Policy, 590757. Amount of Policy, $5000.00.

PROOF OF LOSS

to the

Central National Fire Insurance Company of Chicago, Ill.

BY YOUR POLICY OF INSURANCE NUMBERED 590757, issued at your Agency at Long Beach, Wash., commencing at 12 o'clock noon, on the 17th day of June, 1912, and terminating at 12 o'clock noon, on the 17th day of June, 1913, you insured Wm. Black against loss and damage by fire to the amount of Five Thousand Dollars, according to the terms and conditions of said Policy, the written portion thereof, together with an exact copy of all endorsements, assignments and transfers, being as follows, viz.:

MERCHANDISE FORM.

$5000.00 on his stock of merchandise, consisting principally of wines, liquors, soda and mineral waters, beer and cigars and all other goods, wares and merchandise not more hazardous, kept for sale by assured, while contained in two-story shingle roofed frame building, and adjoining and communicating additions thereto, while occupied as saloon, and situate Lot 6, Blk. 6, Tinker's north addition to Long Beach, Pacific County, Wash.

$.....on store furniture and fixtures while contained in said building.

$.....other concurrent insurance permitted.

POWDER AND KEROSENE. — Permission granted to keep for sale not to exceed fifty pounds

of gunpowder and five barrels of kerosene oil, the latter to be of not less than the United States standard of 110 degrees, neither to be handled or sold by artificial light.

ELECTRIC LIGHTS.—Permission for electric lights, it being agreed that wires shall be doubly coated with approved insulating material, and protected where they enter buildings, by porcelain or hard rubber insulators, and shall also have fusible cut-offs.

LIGHTNING CLAUSE.—This policy shall cover any direct loss or damage caused by lightning, (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; PROVIDED, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not; and provided further, that if dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this company shall not be liable for any loss or damage to such property resulting from any electrical injury or disturbance, whether from artificial or natural causes, unless fire ensues, and then for the loss by fire only.

Attached to and forming a part of Policy No. 590757 of the CENTRAL NATIONAL FIRE INSURANCE CO. OF CHICAGO, ILLINOIS.

HENRY KAYLER, Agent.

Loss, if any, payable to Wm. Black.

The total insurance on said property, or any part thereof, at the time of the fire, including this policy, was five thousand dollars.

A fire occurred on the 27th day of June, A. D. 1912, at about the hour of 1:30 o'clock, A. M. by which the property insured was destroyed, or damaged, as herein set forth, and which originated as follows: Cause unknown.

THE CASH VALUE of each specified subject insured at the time of the fire and the actual loss and damage thereon by said fire as ascertained by appraisal, or by mutual agreement, and the whole amount of insurance thereon were as follows:

1st Item of Policy. Sound value, $8000.00. Total loss, $8000.00. Total Insurance, $5000.00. Total Claim Under Insurance, $5000.00. Claimed of this Insurance Company, $5000.00.

And the insured claim of the above-named Company, by reason of said loss, damage, and Policy of Insurance, the sum of five thousand dollars, in full of their proportion of said loss.

The property insured belonged exclusively to Wm. Black.

If the loss is on building, state whether Real Estate is owned in fee simple or held on lease. Fee simple.

State the nature and amount of incumbrance at the time of the fire. None.

The total value of property saved is $. None as per statement attached hereto, marked Schedule —.

The building insured, or containing said proper-

ty, was occupied in its several parts by the parties hereinafter named and for the following purposes, to-wit: William Black, saloon, and for no other purpose whatever.

The said fire did not originate by any act, design, or procurement on part of assured, nor on the part of any one having any interest in the property insured, or in the said Policy of Insurance; nor in consequence of any fraud or evil practice done or suffered by said assured, that nothing has been done by or with the privity or consent of assured to violate the conditions of the Policy, or to render it void; and then no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and in the possession of the said insured at the time of the said fire; that no property saved has been in any manner concealed, and that no attempt to deceive the said Company as to the extent of said loss or otherwise, has in any manner been made. Any other information that may be required will be furnished on call, and considered a portion of these proofs.

It is furthermore understood and agreed that all bills, invoices, schedules and statements made by the assured, and attached to this Proof of Loss, are to be incorporated into this proof, and are hereby duly sworn to and made a part thereof.

The furnishing of this blank to assured, or making up proofs by Adjuster for Company, is not to be considered as a waiver of any rights of the Company.

WITNESS my hand at Long Beach, Wash., this 22nd day of August, 1912.

WILLIAM BLACK.

Personally appeared Wm. Black, signer of the foregoing statement who made solemn oath to the truth of the same, and that no material fact is withheld that the said Company should be advised of before me this 22nd day of August, 1912.

HENRY KAYLER,

Notary Public in and for the State of Washington, Residing at Long Beach, Wash.

(Transcript 474-483.)

VI.

Said District Court erred upon the trial of said cause in overruling defendant's motion to strike out the following answers given by the witness, Don H. Dickinson:

Q. Do you know the amount and value of the liquors that Black had there?

A. No, sir, I don't the exact amount; I know it is way up in the thousands.

Defendant moved the Court that said answer be stricken out as it was not shown that said witness was competent to testify, and for the reason that said answer was not responsive to the question, which motion the Court denied, and to this ruling of the Court the defendant then and there excepted, which exception was allowed.

(Transcript 484.)

VII.

Said District Court erred in overruling the objection of counsel for defendant to the following question propounded by counsel for plaintiff to the witness, William Black:

Q. What was the market value of the goods lost by you in this fire of June 27, 1912?

To which counsel for the defendant objected upon the ground that it was not shown that the witness was qualified or familiar with the market value of said property; which objection was overruled, to which ruling defendant then and there excepted; which exception was allowed.

(Transcript 484.)

VIII.

Said District Court erred upon the trial of above entitled cause in denying the motion of counsel for defendant to strike out the testimony of the witness, W. A. Hagermeyer, to which ruling of the Court the defendant then and there excepted, which exception was allowed. Said witness having previously testied as follows: I reside in Tacoma. Am in the retail liquor business. I have bought and sold liquors about three years. Am acquainted with the brand of whiskey known as "Old Crow," also with the brand known as "Penwick Rye." Am also acquainted with the brand known as "Cedar Brook McBrayer's." The fair market value per gallon of the whiskey known as "Old Crow" brand of the 1906 vintage, double stamp, I should judge ought to be five or six dollars

per gallon. I should judge the fair market value of the Cedar Brook McBrayer's 1903 vintage, double stamp, should be about six dollars, somewheres along in there, and the Green River double stamp 1902 vintage, ten and twelve years old, not less than seven dollars. I have some goods that were not bought by myself, but bought by my predecessor, wines and so on, that are over twelve years old. I still have parts of them on hand. The prices which I gave are prices where liquor is sold by the gallon out of a retail store. I am not in the wholesale liquor business. I don't know anything about the wholesale value of these liquors during June, 1912. I do not know what wholesalers have to pay for their goods. I do not think that these prices which I mention would include the retailer's profit. I hardly think there would be any profit in selling at that price. I bought some of this kind of whiskey in 1912. I do not remember what my partner paid for them. I didn't myself, personally, buy any of these ages that have been mentioned. If a man was to buy a barrel of any of these different brands and ages of liquors mentioned in 1912 he would have to pay somewhere near I think those prices. That would be to buy by the barrel. The only way I bought any of these ages was in partnership. My partner did the buying and I paid the bills. I think my partner bought some Old Crow of the year 1906. As near as I can remember he paid about five dollars per gallon, from five to six and a half. He bought it in 1912 in San Francisco. I think in June of 1912.

(Transcript 484-486.)

IX.

Said District Court erred upon the trial of said cause in refusing to sustain the motion of the defendant for judgment of nonsuit made at the close of plaintiff's testimony on the ground that the plaintiff refused to furnish the defendant with copies of his purchases and invoices and on account of his refusal ot perform any of the other terms or conditions on his part to be performed, and for the further reason that the market value of the property had not been shown, which motion was denied by the Court; to which ruling of the Court the defendant excepted, and the exception was then and there allowed.

(Transcript 486.)

X.

Said District Court erred upon the trial of the above cause in denying the motion of counsel for the defendant that the court direct a verdict in favor of the defendant, for the reason that the testimony conclusively showed that the plaintiff had been guilty of false swearing in violation of the terms of the policy, and especially in connection with his alleged proof of loss; which motion was denied by the Court, to which ruling defendant then and there excepted, which exception was allowed.

(Transcript 486-487.)

XI.

Said District Court erred in giving and entering a judgment in favor of the plaintiff and against the defendant for the sum of five thousand dollars, with interest thereon at the rate of six per cent. per annum from the sixth day of December, 1912.

(Transcript 487.)

XII.

Said District Court erred in giving and entering a judgment in favor of the plaintiff and against the defendant for interest on $5000.00 at six per cent. per annum from December 6, 1912.

(Transcript 487.)

XIII.

Said District Court erred in denying the motion of defendant to set aside the verdict and judgment, and to grant a new trial.

(Transcript 487.)

XIV.

Said District Court erred in refusing to instruct the jury as requested by defendant as follows:

The insurance policy in this case provides that the entire policy shall be void if the insured shall be

guilty of any fraudulent or false swearing touching any matter relating to the insurance or the subject thereof, whether before or after loss. If you find from the evidence that the plaintiff in this case has wilfully, or carelessly, made claim for loss exceeding the true market value of the property destroyed, or wilfully or carelessly made claim for property not destroyed in the fire and made affidavit to the same, then in that event he cannot recover in this action. False swearing consists of stating a fact as true which the party does not know to be true. If the plaintiff has inserted in his sworn proof of loss any articles as burned which were not burned and knowingly puts such false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover.

(Transcript 487-488.)

XV.

Said District Court erred in refusing to instruct the jury as requested by defendant as follows:

It appears from the evidence in this case that the plaintiff on or about the 25th day of August, 1913, submitted to the defendant a sworn proof of loss, wherein the plaintiff claimed that the value of the property destroyed in the fire and covered by the policy amounted to the sum of $7378.87.

If you find from the evidence that the plaintiff knew the property destroyed in the fire was of substantially less than the amount, or that he could, by the exercise of reasonable diligence, have known

that said property was of substantially less value, he cannot recover in this action, even though the actual market value of the property exceeds the sum of five thousand dollars.

(Transcript 488.)

XVI.

Said District Court erred in refusing to instruct the jury as requested by defendant as follows:

If you find from the evidence that the plaintiff in his sworn proof of loss, placed an excessive valuation on the whole property burned, or on single portions or quantities thereof, and that such excessive claim was wilfully or carelessly made, then your verdict should be for the defendant.

(Transcript 488.)

XVII.

Said District Court erred in refusing to instruct the jury as requested by defendant, as follows:

The jury is instructed that there is no evidence as to the market value of the case goods and therefor they must be eliminated from the case.

(Transcript 489.)

XVIII.

Said District Court erred in instructing the jury, over the exception and objection of the defendant as follows:

It is provided by the statute of the State of Washington (Sec. 105, Laws of 1911, p. 243), as follows:

Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interests therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurable value of the building or property or interest therein at the time such insurance is affected. Under this provision of the law I charge you that the defendant insurance company presumed to know at the time it issued this policy of insurance in the sum of $5000.00 covering the property described in said policy; and situated in the buildings described in said policy, the value of said property. If it now claims otherwise the burden of proof rests with the defendant to so show by a fair preponderance of the evidence.

(Transcript 489-490.)

XIX.

Said District Court erred in failing to instruct the jury that if the property described in plaintiff's complaint and in the policy of insurance was destroyed by the act, procurement or design of the

plaintiff, they should return a verdict in favor of the defendant.

(Transcript 490.)

POINTS AND AUTHORITIES.

"ACTUAL CASH VALUE" WITHIN THE MEANING OF THE POLICY AND AS APPLICABLE TO WHISKEY, WAS THE MARKET VALUE IN THE WHOLESALE LIQUOR MARKET AT THE TIME THE WHISKEY WAS DESTROYED.

Frick v. United Fireman's Insurance Co., 218 Pa. 409.

Fisher v. Crescent Insurance Co., 33 Fed. 544.

State Mutual Fire Insurance Co. v. Cathey, 153 SW. 935 (Tex).

Mitchell v. St. Paul German Fire Insurance Co., 92 Mich. 594.

Mechanics Fire Insurance Co. v. C. A. Hoover Distilling Co., 182 Fed. 590.

IN AN ACTION TO RECOVER FOR LOSS OF PERSONAL PROPERTY UNDER A FIRE INSURANCE POLICY, INTRINSIC VALUE CANNOT BE SHOWN, UNLESS IT IS FIRST SHOWN THAT THE PROPERTY DESTROYED HAD NO MARKET VALUE.

Eddy v. Lafayette, 49 Fed. Rep. 809.

State Mutual Fire Insurance Co. v. Cathey, supra.

IN CASE THERE IS NO LOCAL MARKET VALUE, THE VALUE IS PROPERLY FIXED BY THE VALUE AT THE NEAREST MARKET, DEDUCTING THE COST OF TRANSPORTATION.

Eddy v. Lafayette, supra.

IN AN ACTION ON AN INSURANCE POLICY THE VALUE OF A STOCK OF GOODS MAY BE ESTABLISHED BY EXPERT EVIDENCE. AS IN OTHER CASES THE WITNESS MUST SHOW HIMSELF COMPETENT TO GIVE HIS OPINION AS AN EXPERT.

Ellicott on Evidence, Vol. 3, Sec. 2320.

Thompson on Trial, Vol. 1, Sec. 380.

Ellicott on Evidence, Vol. 2, Sec. 1034.

FAILURE TO PRODUCE BILLS, INVOICES, INVENTORIES OR OTHER PAPERS TO SUBSTANTIATE A CLAIM FOR LOSS AS REQUIRED BY THE POLICY IS A BREACH OF CONDITIONS SUBSEQUENT AND RENDERS THE POLICY VOID.

Ward v. Central Fire Insurance Co., 38 Pac. 1127 (Wn.).

Mutual Fire Insurance Co. v. Pickett, 117 Md. 638.

Farmers Fire Insurance Co. v. Mispelhorn, 50 Md. 180.

Mispelhorn v. Farmers Fire Insurance Co., 53 Md. 473.

Linscott v. Orient Insurance Co., 88 Me. 497.

Atherton v. British American Insurance Co., 91 Me. 289.

Leach v. Republic Fire Insurance Co., 58 N. H. 245.

Gross v. St. Paul Fire & Marine Insurance Co., 22 Fed. 74.

Seattle Merchants Association v. Germania Fire Insurance Co., 116 Pac. 585.

WHERE THE INSURED HAS BEEN GUILTY OF FRAUD OR FALSE SWEARING IN CONNECTION WITH HIS PROOF OF LOSS, THE POLICY BECOMES VOID AND NO ACTION CAN BE MAINTAINED THEREON.

Pottle v. London & Liverpool & Globe Ins. Co., 85 Atla. 1058 (Me.).

Atherton v. British America Insurance Co., supra.

Linscott v. Orient Insurance Co., supra.

Leach v. Republic Fire Insurance Co., supra.

IF THE INSURED MAKES STATEMENTS UNDER OATH STATING A FACT AS TRUE WHICH HE DOES NOT KNOW TO BE TRUE, OR WHICH HE HAS NO REASONABLE GROUND TO BELIEVE TO BE TRUE, OR WHICH ARE CARELESSLY AND NEGLIGENTLY MADE, THIS RENDERS THE POLICY VOID THE SAME AS FALSE STATEMENTS THAT ARE WILFULLY MADE.

Claffin v. Commonwealth Insurance Co., 110 U. S. 81.

Pottle v. London & Liverpool & Globe Insurance Co., supra.

Linscott v. Orient Insurance Co., supra.

Atherton v. British America Insurance Co., supra.

Leach v. Republic Fire Insurance Co., supra.

Herzog v. Palatine Insurance Co., 79 Pac. 287 (Wn.).

EVEN THOUGH THE AMOUNT OF THE ACTUAL LOSS EXCEEDS THE AMOUNT OF THE POLICY, FRAUD OR FALSE SWEARING WILL VITIATE THE POLICY AND PREVENT RECOVERY THEREON.

Fowler v. Phoenix Insurance Co., 57 Pac. 421 (Ore.).

Doloff v. Phoenix Insurance Co., 82 Me. 266, 19 Atla. 396.

Claffin v. Commonwealth Insurance Co., 110 U. S. 81.

THE INSURANCE POLICY PROVIDES THAT IF THE POLICY SHALL BECOME VOID, THE UNEARNED PREMIUM WILL BE RETURNED UPON THE SURRENDER OF THE POLICY. WITH SUCH A CONDITION IN THE POLICY IT IS NOT NECESSARY THAT THE INSURER SHALL TENDER BACK THE PREMIUM IN ORDER TO AVAIL ITSELF OF THE DEFENSE OF FALSE SWEARING OR FAILURE TO FURNISH INVOICES.

Schwarzchild & Sulzberger v. Phoenix Insursurance Co., 124 Fed. 52.

El Paso Reduction Company v. Hartford Fire Insurance Co., 121 Fed. 937.

Schwarzchild & Sulzberger v. Phoenix Insurance Co., 115 Fed. 653.

Straker v. Phoenix Insurance Co., 101 Wis. 413. 77 NW. 752.

Norris v. Hartford Insurance Co. (S. C.) 33 SE. 566. 74 Amer. State Reports 765.

Phoenix Mutual Insurance Co. v. Brecheisen, 50 Ohio 542. 35 NE. 53.

ARGUMENT.

(1) TESTIMONY REGARDING THE VALUE OR QUALITY OF A STOCK OF MERCHANDISE SHOULD BE CONFINED TO A REASONABLE PERIOD PRIOR TO THE DATE OF THE FIRE, AND TESTIMONY OF THIS KIND CANNOT BE GIVEN BY A WITNESS WHO HAS NOT SEEN THE STOCK FOR FOUR YEARS PRIOR TO THE FIRE, AND SUCH TESTIMONY DOES NOT TEND TO PROVE THE AMOUNT OR VALUE OF THE GOODS ON HAND AT THE TIME OF THE FIRE.

Mr. Elliott in his work on Evidence, Vol. 3, Section 2320, says:

"But it was held incompetent for a witness to give his opinion as to the value of the stock where he had not seen the stock recently before the fire and was unable to state definitely the time of seeing the stock with reference to the time it was destroyed."

S. A. Madge, the first witness called by the plaintiff, should not have been allowed to testify as to the character or amount of liqours which Mr. Black had on hand, as he stated that he had not seen the same since 1908. Such testimony is too remote from the time of fire to be of any value in establishing the amount of loss, and if the insured desired to defraud the insurance company, he might be able to produce such testimony in great abundance, even though he had no stock of goods in his store for some time prior to the fire.

Sales of stock from a retail store are being made

from day to day and the amount of stock on hand four years prior to the fire has no connection whatever with the amount of loss.

Assignment of Error No. 1.

(2) BEFORE A WITNESS CAN TESTIFY AS TO THE MARKET VALUE OF PERSONAL PROPERTY IN AN ACTION TO RECOVER LOSS UNDER A FIRE INSURANCE POLICY, HE MUST FIRST SHOW THAT HE IS FAMILIAR WITH WHAT THE MARKET VALUE OF THE PROPERTY WAS AT THE TIME OF THE FIRE.

Mr. Thompson in his work on Trials, Vol. 1, Sec. 280, says:

"An exception to the rule which excludes the conclusion of witnesses is found in another rule which admits their opinion as to the value, provided a foundation is first laid showing that the witness is acquainted with the value of the thing, the value of which is in dispute, and is therefore competent to give an opinion upon the subject."

It is necessary, before asking the witness to state the value of certain personal property at a certain time, to first show that he has information about the particular kind of personal property asked about and what it was selling for in the market at the time during which he is asked to state its value.

In Ellicott on Evidence, Vol. 3, Sec. 2320, we find the following:

"It is well settled in cases on insurance policies that the value of a stock of goods may be established by expert evidence. As in other cases, the witness must show himself competent to give his opinion as an expert, and the weight of the opinion is for the jury."

The witnesses S. A. Madge, Don H. Dickinson, W. A. Hagermayer and plaintiff, William Black, all testified as to the value of the stock, over the objection and exception of the insurance company, without having shown that they were in any way familiar with such personal property, or in any way competent to give testimony as to the value of the personal property alleged to have been destroyed in the fire. Black testified on cross examination that he knew nothing of the market value of his different barrels of liquor at the time of the fire in June, 1912.

(Transcript 197.)

Assignments of Error 3, 4, 6, 7 and 8.

(3) THE PROOF OF LOSS MUST BE SUCH AS TO SUBSTANTIALLY COMPLY WITH THE TERMS OF THE POLICY.

The insurance policy in this case provides that if fire occur the insured shall forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and shall render a statement within sixty days, signed

and sworn to by the insured, stating among other things, the cash value of each item thereof and the amount of loss thereon.

The proof of loss tendered by Black to the Insurance Company contained no statement as to the cost of the different articles, contained goods not items of stock or kept for sale, and did not contain a true and correct statement of the cash value, but stated a gross and exaggerated value of the items alleged to have been destroyed, and did not therefore comply with the terms of the policy.

Assignment of Error No. 5.

(4) WHERE A STOCK OF LIQUORS IS DESTROYED BY FIRE UNDER THE TERMS OF A POLICY LIKE THE ONE IN THE PRESENT CASE, THE MEASURE OF DAMAGES IS THE VALUE OF SUCH LIQUORS IN THE WHOLESALE MARKET.

The Court refused to strike out the testimony of the witness, W. A. Hagermeyer, who testified as to the retail value of the different brands of liquor. Said witness stated that he did not know anything about the wholesale value of the different liquors during June, 1912, the date of the fire.

As stated by the Court in the case of *Frick v. United Firemen's Insurance Company,* 218 Pa. 409, the actual cash value within the meaning of the policy and as applicable to whiskey, was the market value in the wholesale liquor market at the time the whiskey was destroyed.

The case of *Mitchell v. St. Paul German Fire Insurance Company,* 92 Mich. 594, was an action to recover on a policy of insurance for loss and damage to lumber owned by the plaintiff at the time of the fire, and the Court held that the measure of damages was the market value of such lumber at the time of the fire and not the cost of manufacturing the same, although the plaintiff had a mill and standing timber.

In the case of *Fisher v. Crescent Insurance Company,* 33 Fed. Rep. 544, the Court instructed the jury to find from the evidence what was the market value at the time of the fire; that whiskey was a commodity that has a market value in the wholesale trade, dependent usually upon condition of supply and demand; that plaintiff resided near a railway and the markets of the country were convenient to him, and he had an opportunity of purchasing at market prices whiskey equal in quality to the article destroyed.

The witness Hagermeyer testified that he had not bought any of the whiskies of the ages mentioned personally; that he knew nothing of the wholesale value of the liquors about which he was testifying.

The motion of the Insurance Company to strike out his testimony therefore should have been sustained, as such testimony was incompetent.

Assignment of Error No. 8.

(5) REFUSAL OF THE INSURED TO SUBMIT TO EXAMINATION UNDER OATH, PRODUCE FOR EXAMINATION HIS BOOKS OF ACCOUNT, BILLS, INVOICES, OR OTHER VOUCHERS, OR CERTIFIED COPIES THEREOF, IF ORIGINALS BE LOST, OR TO PERFORM ANY OF THE OTHER CONDITIONS OF THE POLICY ON HIS PART TO BE PERFORMED, RENDERS THE POLICY VOID AND NO ACTION CAN BE MAINTAINED THEREON.

Fire occurred on the 27th day of June, 1912, and on August 19, 1912, the insured wrote to Adjuster, W. G. Lloyd, the following letter:

Long Beach, Wash., Aug. 19th, 1912.

Mr. W. G. Lloyd,
Portland, Ore.

Dear Sir:

I have been waiting since June 27th for you to come down and inspect the site of my building that was burnt on that date. I wish to clear up the rubbish from place but do not want to touch anything till you have seen it. Mr. Whalley of the New Hampshire Ins. Co. refers me to you, hence this letter.

I wish you would make it a point to come as soon as possible.

Yours respect'y,

Wm. Black.

(Transcript Vol. 2, p. 460.)

Thereafter and in answer to said letter, W. G. Lloyd, Adjuster, whote to Black as follows:

August 20th, 1912.

Mr. Wm. Black,

Long Beach, Wash.

Dear Sir:

I have your letter of August 19th, relative to purported claim by reason of fire and in reply I beg to advise you as follows:

If you have a claim under Pol. No. 590757, issued to you by the Central National Fire Ins. Co. of Chicago, Ill., and Pol. No. 2661130, issued to you by the New Hampshire Fire Ins. Co. of Manchester, N. H., both of which Companies I represent, and on behalf of said Companies I desire to call your attention to the terms and conditions as set forth in lines from 67 to 112 inclusive.

You are hereby required to submit proofs of loss as set forth and in accordance with instructions thereby given in said policies, within sixty days of the fire.

Upon above compliances, I will give the matter attention.

The said Insurance Companies, above referred to, hereby neither admit nor deny liability.

Very Truly Yours.

(Transcript Vol. 2, p. 465.)

Thereafter and on the 23rd day of August, 1912,

Black sent to Mr. Lloyd the purported proofs of loss, with the following letter:

WM. BLACK,
LONG BEACH, WASH.

Long Beach, Wash., Aug. 23, 1912.

Mr. Lloyd,
Portland, Ore.

Dear Sir:

Enclosed please find Proofs of Loss as requested.

Yours respect'y,

Wm. Black.

(Transcript Vol. 2, p. 459.)

Thereafter and on the 31st day of August, 1912, W. G. Lloyd, Adjuster, acknowledged receipt of said purported proofs of loss by the following letter:

September 10th, 1912.

Mr. Wm. Black,
Long Beach, Wash.

Dear Sir:

We are in receipt of your favor of August 23rd, enclosing papers purporting to be proofs of loss under policy No. 590757, issued to you by the Central National Fire Insurance Company, making claim for loss by fire alleged to have occurred on June 27th, 1912.

The said papers cannot be accepted as satisfactory for the following among other reasons which may subsequently be made to appear.

The list of articles innumerated is only a memorized list and also contains articles which are not items of stock.

The amount set forth in said list as representing the value, are grossly in excess of the true sound value of said articles, alleged to have been destroyed.

Under the terms and conditions of your policy you are required to exhibit the last authentic inventory taken of your stock or a certified copy thereof. You will also supply bills of purchases of stock since the last said inventory, or if said bills of purchases have been destroyed, then certified copies of the original bills.

You also are required to supply a record of your sales made of stock since the date of inventory above referred to.

The said papers cannot therefore be accepted as satisfactory and are held subject to your order.

This company hereby neither admits nor denies any liabilities to you.

Very Truly Yours,

(Transcript Vol. 2, p. 463 & 464.)

Thereafter and on September 12, 1912, Black wrote to the Adjuster as follows:

WM. BLACK,
LONG BEACH, WASH.

Sept. 12th, 1912.

Mr. W. G. Lloyd,
Adjuster Fire Losses,
Portland, Or.

Dear Sir:

Your letters of Sept. 10th have been referred to my lawyers.

Yours, truly,

Wm. Black.

(Transcript Vol. 2, p. 459.)

Thereafter and on October 9th, 1912, the Adjuster again wrote to Black the following letter:

October 9th, 1912.

Mr. Wm. Black,
Long Beach, Wash.

Dear Sir:

On September 10th, 1912, we wrote you, requesting further data and information relative and supplemental to papers filed by you under policy No. 590757, issued to you by the Central National Fire Insurance Co.

To this you replied on September 10th, 1912, that you had referred the matter to your Lawyers, and since which time nothing further has been heard. If you intend making any claim, we notify you that you comply with our request of September 10th, 1912, above referred to.

(Transcript Vol. 2, p. 464.)

Thereafter and in answer to said letter, Black wrote the Adjuster the following letter, dated October 11th, 1912:

WM. BLACK,
LONG BEACH, WASH.

Oct. 11th, 1912.

W. G. Lloyd,
Portland, Ore.

Dear Sir:

What has struck you? I have complied with the law. Send you proof of loss which you refuse to receive as such and claimed in your letter that it was a memorized list. As far as I am or was concerned that letter closed the matter between you and me. I have been treated rotten by you. You have never called on me and I never saw you. This has been my first fire and I have had no experience in matters of this kind and want no more. I insured, payed my money and have met with a loss and want mine and I am going to have it; and take this from me, I have furnished you with every thing covering this my loss.

Wm. Black.

Say you had better save your stamps, I will get them just the same with a 2 cent stamp or do you take me for a farmer.

(Transcript Vol. 2, p. 461.)

The foregoing correspondence represents all of the negotiations between the Insurance Company and Black between the date of the fire and the bringing of the action to recover the alleged loss. No personal conversation or negotiations other than this correspondence was carried on between the parties until after the action was brought in De-

cember, 1912. In January, 1913, Mr. Lloyd interviewed Mr. Black personally regarding certain matters connected with his loss.

The policy provides that the insured "as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company, or its representative, and shall permit extracts or copies thereof to be made."

The policy also provides that the insured shall submit to examination under oath by any person named by the company and subscribe the same.

The Adjuster's letter of September 10th, 1912, requesting plaintiff to produce his inventory, or certified copies of his bills of purchases, did not specify the place where the same were to be produced. This failure, however, to specify the place for the production of the papers was waived by Black's refusal to produce the papers at any place whatever. In Black's reply to said letter he stated that he had complied with the law and that the letter closed the transaction between himself and the Adjuster. He stated in his letter, "As far as I am or was concerned, that letter closed the matter between you and me." He also stated in said letter, "I have complied with the law, and take this from me, I have furnished you with everything covering this my loss."

It is a well settled rule of law that demand is unnecessary where it is shown to be unavailing, and inasmuch as Black notified the Insurance Company that he would not produce any books, papers, etc., or assist the Compnay any further in investigating

or adjusting the loss, and that he would not comply with any of the conditions on his part to be performed, any further demand on the part of the company would be useless, and specification of the place for the production of the books and papers was thereby waived.

The law does not require the performance of a useless act and where the circumstances show that a demand would be unavailing, it is unnecessary that demand should be made.

Burrows v. McCalley, 17 Wn. 269. 49 Pac. 508.

Chappel v. Woods, 9 Wn. 134. 37 Pac. 286.

In denying the Insurance Company's motion for non-suit on account of the refusal of the insured to produce his inventory, and certified copies of his books of account, bills, etc., for inspection, the Court stated that in his opinion, in order to comply with the terms of the policy, the demand must request the production of these papers at Long Beach, Washington, where the insured resided. However, it will be seen from the correspondence that the insured absolutely refused to produce any books or papers for inspection at any place whatever, and in addition to this refused to perform any of the terms or conditions of the policy on his part to be performed, in assisting the company in adjusting the loss, stating that he had complied with the law and furnished everything that was required, and that the company's letter to him requesting books and papers settled the matter as far as he

was concerned. In fact the demand for these papers is admitted in the answer and it is alleged that Black complied as far as possible, but compliance was not proven by Black.

Any one who reads the testimony in this case cannot fail to realize that this was a situation where the production of bills and inventory was highly important and necessary to aid the Insurance Compnay in adjusting the loss and securing information as to Black's stock. Black's own testimony at the trial which was evasive, contradictory and obviously false, shows how unsatisfactory his affidavit as to the amount of loss would be as evidence for the purpose of adjustment.

The production of invoices at the trial of the case and the answers to the interrogatories propounded to Black (Transcript, p. 49), show that he had knowledge as to where all of his goods had been purchased, and duplicate invoices could have been secured by him covering all of the goods which he had purchased. As stated by the Supreme Court of the State of Washington in the Ward case above cited, "He seemed to have from the start cavalierly settled this question, both for himself and the other party to the agreement."

Black, however, in his reply admits that demand was made upon him for the production of his inventory and certified copies of his bills of purchases, but alleged that he produced all papers in his possession; that he did everything within his power to comply with the demands and requests made by the insurance company, its officers, agents and servants, for information concerning the extent of plaintiff's loss.

A case almost identical is that of *Ward v. National Fire Insurance Co.* (*Wn.*), 38 Pac. 1127. In that action the insured wrote to the company, in reply to their demand for the production of certified copies of bills, invoices and other vouchers in support of his claim, as follows:

"'I have had business with about fifteen different wholesale grocery men, both here and in other places outside, besides buying considerable goods at bankrupt sales and job lots around the city, besides credit purchase I have bought a great deal of merchandise where it would be impossible to furnish invoices.' 'Now the proposition of furnishing to you invoices of all goods bought while in business, I would be pleased to do, providing it was in my power to do so, but the circumstances that attend a business running so long are such that it renders it practically impossible to comply with your request, and I cannot see what would be gained, providing it was possible. I furnished what I supposed would be conclusive evidence that at the time of the fire I had more goods than the insurance called for.'"

In passing on the case the Court said: "It is not for the insured in the face of such an agreement to determine that because he cannot furnish all the proof as required, he will refuse to furnish any, or refuse to aid the insurer in any way in determining questions that are of vital importance to them in the case. In fact, the insured seems from the start to have cavalierly settled this question, both for himself and the other party to the agreement. He stated in his correspondence that he could not see what would be gained in furnishing this data, if

it was possible, then announced that he furnished what he supposed would be conclusive evidence that at the time of the fire he had more goods than the insurance called for, evidently resting upon the proof that he had furnished outside of this requirement."

The Court further stated, "If he knew as little about his business as his testimony would indicate, it would become very important to the insurer to have some data outside of his own testimony to satisfy it of the amount of the loss, or of the goods that were actually in the house at the time of the fire."

In the case of the *Seattle Merchants Fire Insurance Co. v. Germania Fire Insurance Co.,* 116 Pac. 585, the Court states:

" 'The obvious purpose for the provisions for an inventory is to aid in determining the value of the stock and the amount of loss to make the basis for an adjustment, and in the event of disagreement to lay the foundation for arbitration and appraisement. The assured seems to have assumed that he alone had the right to determine that the loss was total and refused in any way to aid the insurer to ascertain the actual value of the stock or the value of his salvage.' "

The Court in that case approves the case of *Ward v. National Fire Insurance Co.* above cited.

In the case of *Gross v. St. Paul Fire & Marine Insurance Co.,* 22 Fed. 74, the Court says:

"A stipulation that the assured will submit to examination on oath, etc., is valid, and is not onerous

to the insured and is for the protection of the insurer. It is akin to a stipulation requiring the insured to exhibit his books of account, invoices, etc.; one in the interest of justice and fair dealing."

In the case of *Farmers Fire Insurance Co. v. Mispelhorn* above cited, the Court held that it was not an excuse for the failure of the insured to produce duplicate bills of purchases and invoices that were not in his possession or at his command at the time the demand was made, if they could have been had by application to those who could furnish them, and he would be bound to procure and exhibit them, and the Court further holds that the burden of proof to show that they could not be procured was on the plaintiff.

Black's statement that he had complied with the law; that the letter from the Adjuster closed the matter between them and that he wanted his money and was going to have it, and that he had furnished them with everything covering his loss, was a refusal not only to produce his inventory and certified copies of his bills of purchase, but was a refusal to submit himself to examination upon oath, and was a refusal to comply with any of the other terms or conditions of the policy on his part to be performed.

The suspicious circumstances of the present case are such as to demand the application of the rules of law regarding the production of books and papers, more loudly than in most of the reported cases, as the evidence submitted by Black as to the amount of his stock on hand is very meager, unsatisfactory, evasive and suspicious.

(6) WHERE THE INSURED HAS BEEN GUILTY OF FRAUD OR FALSE SWEARING IN VIOLATION OF THE TERMS OF THE POLICY, THIS RENDERS THE POLICY VOID AND NO ACTION CAN BE MAINTAINED THEREON, AND WHERE THE FACT THAT THE INSURED HAS BEEN GUILTY OF FRAUD OR FALSE SWEARING IS CLEARLY PREPONDERANT OR UNDISPUTED, THE COURT SHOULD DIRECT A VERDICT.

In the case of *Howell v. Hardford Fire Insurance Co.,* 12 Fed. Cases, 700, the Court instructed the jury that where there is such evidence as displays a reckless and dishonest disregard of the truth in regard to the extent of the loss, it is deemed fraudulent and causes the forfeiture of all claims under the policy.

In the case of *Atherton v. British America Insurance Company,* 91 Me. 286, the Court held fraud or false swearing to "Consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for believing to be true."

An examination of the testimony and evidence submitted by Black is sufficient to conclusively establish false and fraud swearing without reference to the testimony submitted by the defendant.

We first set forth some of the testimony of Black and the agent, Henry Kayler.

Henry Kayler, who wrote the policy on behalf of the Insurance Company, was called as the first witness on behalf of the plaintiff, and testified that

he had known Black for a number of years; had represented Black in a number of previous matters and in his evidence disclosed that he was intimately familiar with Black's affairs and the stock of goods.

It was contended by the Insurance Company at the trial of the case that the Insurance Agent, Henry Kayler, entered into an active conspiracy with Black to defraud the Insurance Company. This man testified that on the 18th day of May, 1912, he was employed by Black for the purpose of taking an inventory of the stock of liquors and cigars in his saloon. He testified that the taking of the inventory required two days and was completed on the 20th day of May, 1912, and for his services in taking this inventory he received $4.00. That Black assisted him in taking the inventory, Black enumerating the number of the different articles and he writing them down; that they made the inventory in triplicate, one of which was sent to a prospective purchaser, one retained by him and one given to Mr. Black. The witness Kayler testified as follows:

Q. Mr. Black was not in town at the time this policy was written, was he?

A. No, sir. I do not think he was. He was not home. He was in town when he told me to write it, but he was not at home when I delivered it.

Q. About when was that?

A. Three or four days before I delivered it.

Q. Was it delivered the same day as bears date here, on the 18th day of June?

A. No, sir. Two days afterwards, because I was waiting for him to come home.

Q. You delivered it on the 20th?

A. Yes, sir.

Thereafter the witness testified further as follows:

Q. How long before the 18th day of June did he request this policy?

A. In May.

Q. About what time in May?

A. Well, sometime about the 18th or 20th.

Q. Did he tell you that he wanted a policy on his stock?

A. Yes, sir.

Q. He was in Long Beach at the time he told you to go ahead?

A. Sure.

Q. About when was that?

A. That was about the 20th?

Q. About the 20th of May?

A. Yes, sir.

Q. You did not write it out until about the 18th of June?

A. No, sir. Because he had not finished taking stock yet. He was taking an inventory of what he did have and I helped him.

(Transcript, pages 105 and 106.)

Mr. Black testified as follows:

Q. Going back to the time of the taking out of

the policy. Before you got this policy you had insurance on your stock for $2000.00?

A. Yes, sir.

Q. And Mr. Loomis carried that insurancce for you?

A. Yes sir.

Q. Mr. Loomis is an insurance agent at Long Beach?

A. He lives at Nahcotta.

Q. That is in your neighborhood?

A. Yes, it is seven or eight or ten miles.

Q. Now, his policy expired on the 16th of June, didn't it?

A. No, sir. It expired in July.

Q. July, 1912?

A. I think so. I would not be positive.

Q. And you returned this policy to him on the 8th of June, didn't you?

A. I returned his policy to him after I took out another policy; that is the present policy.

Q. And you returned this policy to him before it expired?

A. I returned it before it expired, yes, sir.

Q. And between the time that you had that $2000.00—between the time that you returned that insurance of his and the time you took out this policy, you had a policy of $5000.00 in the Royal Insurance Company, which was cancelled too, didn't you?

A. On that (interrupted).

Q. On the stock of goods?

A. Now, I will tell you—I do not—there is something about it—I do not know whether it was before or whether it was on the hotel that I took it out, after the fire. I know there was a policy or two, somebody wrote up these policies and then they wrote back the agent did not care to take the risk under the present conditions, down there. I do not know whether it was on the saloon or whether it was on the hotel at the time of the fire. I had no policy on the hotel, but after this fire I took out a policy and it was rejected, sent back, and I saw the letter and they said to the agent they did not wish to take the risk under the present conditions, or something to that effect, existing in Long Beach at that time. (Transcript 213-214-215.)

The testimony disclosed that Black turned the keys of his saloon over to his bartender, Don H. Dickinson, on the 27th day of May, 1912, and that said bartender had entire charge of the business until its destruction on the 27th of June, 1912. That Black was in his saloon from May 27th to June 27th, only once for a few minutes, Saturday evening preceding the fire. The bartender testified that there were three rooms in the building, the front room was where the bar was located, and two back rooms; one of the back rooms was used for a storeroom where case goods were located; the other back room was merely a side entrance. That the storeroom contained the case goods and a few barrels; that the storeroom was 12 feet by 15 feet by 10 feet high, and that the small room was not used for anything especially. That the whiskey barrels were kept in the front room and that the case goods,

beer barrels, empty beer bottles, soda water and two or three barrels of whiskey were located in the storeroom; that as soon as he sold a case of liquor, he burned the empty case in the stove. That he sold all of the goods that were in the showcases and opened up about two cases more. That no liquors or cigars were received while he was in charge of the saloon. That there were at least fifty cases of case goods in the back room; that they were all piled up in one row and took the whole side on the north side of the building, except where the windows were; that the case goods were piled in one row on the north side of the storeroom, about half way to the ceiling, just on one side of the room; that the barrels of beer, soda water, empty bottles, the stove and two chairs were all in the back room. That there was a large door between the storeroom and the saloon bar; that the bottles were stored away in the little room which was not used; that the one stove heated all the rooms; that the size of the entire building is 25 feet by 60 feet outside measurement; that the upstairs was not being used at that time; that there was no goods stored up there to his knowledge.

The inventory attached to Black's proof of loss contained 30 barrels of whiskey and wine, 7 barrels of beer, and 1 barrel of soda water, and 157 cases of case goods. Bearing in mind the size of the room, which was 12 feet by 15 feet by 10 feet high, it will be readily seen that the amount of goods which Black claimed he had on hand could not have been contained in this entire room. Black's testimony shows that each case of case goods was 2 feet wide and 2½ feet long, and 14 inches high

(Transcript, p. 182). The case goods would occupy a space of over 800 cubic feet (while the room contained 1800 cubic feet of space) to say nothing of the barrels of beer, soda water, chairs, stove and other vacant spaces in the room. The case goods claimed to have been destroyed would have covered the entire floor space of the room, nearly half way to the ceiling, while the testimony shows that there was but one row of case goods along the north wall which reached about half way to the ceiling, and that it did not even cover the entire north wall, leaving spaces where the windows were.

Black testified that there were three large show cases in the bar room containing imported bottled goods, each containing 12 cases of case goods, or a total of 36 cases, making the total number of cases claimed 193, (Transcript, pages 182-3), while Mr. Dickinson, the bartender, testified that all of the case goods were sold by him out of the show cases and two of the other cases in the storeroom were also sold. (Transcript, p. 148.) It appears therefore from the undisputed testimony that there were 38 cases less of case goods in the saloon at the time of the fire than at the time of taking the inventory, in addition to sales of cigars, and whiskey out of the barrels, and also beer. Black in his affidavit and proof of loss swore that all of the stock was in his saloon at the time of the fire that was included in his inventory taken on May 18th. That this was a wilfull and deliberate attempt to defraud the insurance company there can be no doubt. It will be remembered that there were triplicate copies of the inventory made, one of which was attached to the proof of loss, which proof of loss was

introduced in evidence and marked Plaintiff's Exhibit "3" (Transcript, p. 432). The other inventory was retained by Henry Kayler, the insurance man and introduced in evidence and marked Defendant's Exhibit "A8" (Transcript, p. 455).

The inventory retained by Henry Kayler, (defendant's Exhibit "A8,") and the inventory attached to Black's proof of loss, being the one retained by him, are identical. Black made claim for the entire amount of goods which he claimed he had on hand on May 18th, without allowing any deduction for sales, which, as the undisputed testimony shows, amounted to considerable between the date of the inventory and the date of the fire. The items of the inventory attached to the proof of loss make a total sum of $7378.85, and in spite of the fact that this included a large number of articles not covered by the policy and not items of stock, and about six weeks' sales, and that the value of most of the items was grossly exaggerated, Black testified at the trial and swore, that the value of his stock at the time of the fire was over $8000.00, thus adding nearly $700.00 to his already grossly excessive claim. The undisputed testimony is that Black wilfully made claim for the entire amount of goods sold by him between the date of the inventory and the date of the fire at a grossly exaggerated value.

The testimony shows that the largest items of his stock were purchased from Blumauer & Hoch, of Portland, Oregon, and their disposition, with statement attached (Transcript, pages 466-7-8), shows that he purchased the total amount of $2643.25, and that they were all the goods they sold him, although Black testified that he bought more than that amount from them.

He also testified that said firm was not the firm with whom he did the largest business, although he was unable to give the name of any other firm from whom he had ever bought more than three or four hundred dollars worth of goods. Of the items claimed by Black in his proof of loss more than $2200.00 of the amount at the prices listed by him, were purchased from Blumauer & Hoch, and yet one-half of his entire purchases from this firm were made during the year 1908, and the other half in 1909.

An examination of the interrogatories propounded to Black prior to the trial discloses that he was able to state from memory the firms from whom he purchased the forty or more different items about which he was asked, some of the items amounting to just a few dollars and were purchased eight years prior to date of his answer, yet he could not recall the name of the firm with whom he had transacted more business than he had with Blumauer & Hoch.

Answering Interrogatory No. 42 (Transcript, p. 62), Black stated that he had to rely upon casual memory, as he had no book account or invoices, original or copies thereof, of the goods he purchased for his saloon at Long Beach, Washington, because the same were destroyed when his saloon was burned with all its contents, yet the testimony at the trial disclosed that at the time he made proof of loss he had in his possession an original duplicate inventory made on May 18th, 1912, and that another original duplicate inventory was in the custody of his agent, Henry Kayler, which inventory was introduced in evidence and marked Defendant's Exhibit "A8."

By an examination of the answers to the forty-two interrogatories propounded to Black (Transcript, p. 49), it will be observed that in answering each interrogatory Black testified "for the reason that his books and copies of inventories were destroyed and lost by having burned in the building where said stock was kept."

It will be further observed that in answering said interrogatories, although Black said he had to rely upon casual memory, he was able to give the names of the dealers from whom he had made very small purchases as much as five and six years prior to the date of the fire. Many of the firms who sold him goods, which he claimed were destroyed in the fire, had transacted no business with him since 1906.

In Black's proof of loss there is an item of one barrel of Fox Mountain Whiskey, for which he claimed $400.00. This whiskey was purchased by Black on January 25th, 1911, for $162.43 (Invoice of same Transcript, p. 469-470). We submit herewith some of Black's testimony regarding it:

Q. In your proof of loss you claim one barrel of Fox Mountain whiskey, not tapped, four hundred dollars. Where did you buy that barrel?

A. I bought it from Brown, Foreman & Company.

Q. What did that cost you?

A. I think that was six or seven and a half a gallon.

Q. You heard Brown & Foreman's testimony as to what you paid for it?

A. Yes, sir.

Q. How many gallons was there in that barrel?

A. I do not remember.

Q. Is it not a fact that you did not pay only a hundred and fifty dollars for that barrel of whiskey or about that much?

A. I paid more than that for it.

Q. Is it not a fact that you paid less than two hundred dollars for that barrel?

A. I was offered ten dollars a gallon for that whiskey.

Q. What year did you buy that whiskey? Didn't you buy that in 1911?

A. I think I did.

Q. Well, that was not very old?

A. Why, certainly it was.

Q. It was old when you got it?

A. It was old when I got it.

Q. How did you happen to get it so cheap?

A. A friend of mine got it for me—they found that afterwards; they found it in their warehouse and did not know that they had it.

Q. Brown & Foreman Company friends of yours?

A. They are; yes, sir.

Q. They are in the wholesale liquor business?

A. They are distillers.

Q. Who is your friend in that company?

A. Why, their agent.

Q. What is his name?

A. His name is Walton.

Q. Do you mean to tell this jury that barrel of liquor you bought in 1911 for less than two hundred dollars a barrel, was worth four hundred dollars?

A. I tell you, gentlemen, I could have put a big price on that liquor. That was a rare piece of goods. I would sell no one a bottle of it. Now, that barrel was tapped; it was not untapped, but it had only been tapped a little while, and there was very few people that ever took a drink out of it. I sold it for twenty-five cents a drink.

Q. Who were some of the people you sold out of it?

A. Very few.

Q. If it was not untapped, why did you swear in your proof that it was untapped?

A. Well, I had just tapped it.

(See Transcript, p. 179 and 180.)

Later on in Black's cross examination the following appears:

Q. In your proof of loss, you made a claim for a barrel of Fox Mountain whiskey. I will ask you if you bought that from Brown-Foreman & Company?

A. Yes, sir.

Q. And you paid for that whiskey $162.43? That was the testimony of the company?

A. I guess so; I guess that is it.

Q. You claim now $400 for it, and you bought that liquor in 1911?

A. I was offered $10 a gallon for that whiskey. It was a pick-up.

Q. I am not asking you that. I am asking you, if you claim $400 for liquor that you bought in 1911?

A. Yes, but—(interrupted).

Q. On your proof of loss, you asked $400 for that barrel of liquor?

A. Yes, sir.

Q. And you tapped it and took some out of it?

A. No liquor sold out of that barrel. I had given some—let some people taste it, but it was over one hundred and twenty proof.

Q. You will swear that you never sold any whiskey out of that barrel?

A. Never sold any of that out of that barrel—(interrupted).

Q. Didn't you testify yesterday you sold some at twenty-five cents a drink?

A. I was going to sell that at twenty-five cents a drink.

Q. Is not that what you testified to yesterday?

A. There was a few people tasted that whiskey; I never sold any of that whiskey.

(See Transcript, p. 197 and 198.)

It will be seen from the above quotations from the testimony, that although Black swore in his proof of loss that said whiskey was untapped, he testified at the trial he had been selling said whiskey at twenty-five cents a drink. The next day when the subject was again brought up, he swore positively that he never sold any of the said liquor. As a further illustration of the type of testimony upon which the verdict and judgment in this case was based, we submit the following:

Black had testified that he had returned to Long Beach from Portland the Friday night preceding the fire, and the following questions were asked him (Transcript, p. 186):

Q. Do you know how late Mr. Dickinson kept open that night?

A. I do not.

Q. Did he give you the money when he came home that night?

A. Yes, sir.

Q. Gave you the money personally; did not give it to your wife?

A. No, sir. I was there and he gave it to me.

Mr. Langhorne: What week are you talking about?

Mr. Cole: This was on Friday preceding the fire. You said, Mr. Dickinson gave you the money that night?

A. Yes, sir.

(It will be remembered that *Dickinson* testified that he did not see Mr. Black until Saturday preceding the fire.) (Transcript, p. 144-145.)

Q. When Mr. Dickinson testified, as you heard this afternoon, that he did not see you until Saturday, he was wrong?

A. It may have been Saturday. I do not testify positively I saw him Friday night. I do not remember.

Q. Well, he gave you the money?

A. He gave it to me Saturday night, one night while I was there; he gave it to me, I think, Saturday night. I do not think I saw him Friday night.

Q. You did not see him the Friday night when he gave the money to your wife?

A. Probably did; I do not believe I saw him Friday night.

In addition to the character of the testimony given by Black, it will be remembered that the uncontradicted evidence in the case shows that Black's reputation for truth and veracity in the community where he lives, is poor.

Black attempted to explain the high prices demanded for goods in his inventory on the basis that his trade demanded a high class of liquor. (Transcript, p. 164.) However, the next day Black testified that most of the stuff drank at Long Beach was beer. (Transcript, p. 231-232.)

In Black's proof of loss was a claim for three barrels of Penwick Rye whiskey. This whiskey was sold to him by Blumauer & Hoch, who sold him a total of five barrels in 1908. At that time they sold him five barrels of Penwick Rye, five barrels of Green River, and in 1909, five barrels of Old Crow. This lot of liquors bought by Black from Blumauer & Hoch constitute a large part of his claim for

goods lost in the fire. The invoice of the number of gallons and the cost price of these liquors is found on pages 466-7-8 of the Transcript.

Black also testified that Green River whiskey contained 46-47 and 49 gallons to the barrel (Transcript, p. 228). Invoice shows 35-36 and 37 gallons to the barrel (Transcript, p. 466). He testified that Penwick Rye barrels contain about the same number of gallons, while the invoice shows 38 and 39 gallons to the barrel. (Transcript, p. 467.) He testified that his barrel of Old Crow contained 47 and a fraction gallons when he first bought it (Transcript, p. 227), and the invoice shows 40 and a fraction gallons to a barrel (Transcript, p. 467).

Black testified that he had some article in his saloon not listed in the proof of loss (Transcript, p. 169 and 170). He stated that the goods consisted of liquors and cigars, for which he had paid $350.00 at sheriff's sale in 1911—being the stock of a man named Nye. The cigars he sold (Transcript, p. 170). Some of the liquors were also sold to another liquor dealer, the amount was uncertain but enough to supply him for several days (Transcript, p. 231). There is no testimony anywhere as to the amount or value of said liquors on hand at the time of the fire, if there were any, and the evidence indicates pretty strong that there was none of said liquors on hand at the time of the fire. The bartender Dickinson testified that there were none to his knowledge. (Transcript, p. 156.)

With reference to there being any liquors upstairs in the room, the witness Kayler testified as follows: (Transcript, p. 112.)

Q. No other case goods were kept in any other rooms except these two?

A. He had another room out on the other side where he had some in, and then he had some upstairs.

After asking two or three more questions the following question was asked:

Q. How many did he have upstairs?

A. I do not know whether he had any of the case goods.

Thereafter, later on in Kayler's testimony the question was again repeated as follows:

Q. There was no case goods upstairs?

A. Yes, there was, but I did not take an invoice of them.

In answer to interrogatories No. 26 and No. 28 (transcript p. 57) Black testified that the item of three cases of Atherton whiskey and two cases of McBrayer's whiskey, which were listed in his proof of loss, were purchased at sheriff's sale from A. B. Nye & Company. This is directly contradictory to the statement that these goods purchased were placed upstairs in his room and not placed with his other stock. The statement of Black that he had the stock upstairs which he purchased at sheriff's sale in 1911 and which was not included in his proof of loss, was a willful and deliberate falsehood.

With reference to moving some liquors out from an outbuilding into his saloon in May, 1912, prior to the fire, Black testified as follows: (Transcript p. 216.)

Q. How many barrels did you have in that outbuilding?

A. A number of them. I could not state how many.

Q. Did you have two?

A. Oh, yes, a lot more than that.

Q. A dozen?

A. Six or seven or eight barrels in there.

Q. What brands were they?

A. Different brands.

Q. Name some of them.

A. There were five barrels of Old Crow in there.

The next day he testified, when asked relative to the same matter, as follows: (Transcript p. 400).

Q. Let us get back to this whiskey you moved into your saloon in May; how many barrels did you move in; have you any idea as to the number or have you forgotten?

A. I have forgotten what I moved in there.

Henry Kayler testified as the principal witness on behalf of the plaintiff. The evidence shows that he had been in Black's employ considerable, visited Black's saloon nearly every night, purchased considerable liquor from Black, and was in the saloon on the night of the fire from about nine o'clock until closing time, about 11:30, and that he left when the bartender went home. His evidence was evasive and contradictory.

The bartender testified that there was a stove in the back room where the case goods were stored, and that he had a fire in the stove on the day of the fire and that he burned up the empty cases in the stove. However, Kayler testified that there

was no stove in the building at the time of the fire. (Transcript p. 110):

Q. There is a stove and tables and chairs in there?

A. No, not in the summer-time.

Q. Where were they?

A. The stove was moved out doors.

In Black's proof of loss were two barrels of Clark Bros. whiskey, which he said were untapped and made affidavit to that effect. However, the undisputed testimony shows that it had been tapped (Transcript p. 115). Black was, therefore, guilty of false swearing in connection with this item of two barrels of Clark Bros. whiskey, as he wilfully and deliberately swore that it was untapped when part of it had been sold.

Kayler corroborated the bartender's testimony that the case goods were piled in one row on the north side of the back room (Transcript 109).

Black was also guilty of willful and false swearing in connection with his answer to Interrogatory No. 41, (Transcript p. 61), wherein he stated that a portion of his stock which was burned was purchased from the Sunnybrook Distilling Company. His testimony at the trial disclosed that the Sunnybrook whiskey which he purchased from the Sunnybrook Distilling Company was resold by him to Blumauer & Hoch, and that he never had any Sunnybrook whiskey in his saloon (Transcript p. 210 and 211).

It will be remembered that the Penwick Rye and Green River whiskies were purchased by Mr. Black in 1908 before he left Ilwaco and that he

shipped them from Ilwaco to Long Beach on the Ilwaco Railroad. The evidence of the railroad company shows that Black shipped 24 barrels of liquor on June 16, 1908, from Ilwaco to Long Beach (Transcript p. 452), and that all of the barrels were "only part full." That the 24 barrels of liquor, two show cases, one cash register and five chairs weighed only 4000 pounds. There is no evidence as to what the show cases, cash register and chairs weighed, but it will readily be seen that the 24 barrels of liquor could not have weighed more than 3600 pounds, and probably weighed less, which would be an average of 150 pounds per barrel. This whiskey had been in wooden barrels for several years and the barrels were undoubtedly very heavy. It is highly improbable, therefore, that there was over 75 pounds of whiskey in each barrel, which would be about eight gallons.

Black testified that when he moved from Ilwaco to Long Beach in 1908, he moved five barrels of Green River whiskey and five barrels of Penwick Rye whiskey (Transcript p. 174).

One barrel of 1899 Old Crow whiskey was purchased from F. Chevalier & Co. of San Francisco (Transcript p. 50). The deposition of Mr. J. A. Fogahty (Transcript p. 359) shows that said whiskey was sold to Black prior to April 18, 1906, said barrel of whiskey if it was contained in Black's saloon at Long Beach was moved in the same shipment.

"The Court will take judicial notice of standard legal weights and measures." Elliott on Evidence, Vol. 1, Sec. 73.

The two barrels of Clark Bros. whiskey weighed 838 pounds (Transcript p. 448).

Webster's Dictionary states that one gallon of water weighs ten pounds. That the specific gravity of whiskey is not less than .917 or more than .930. Ten barrels of Green River and Penwick Rye whiskies contained 377.97 gallons; the weight of these ten barrels of whiskey, therefore, would be a little over 3440 pounds exclusive of the barrels. The number of gallons of 1899 Old Crow whiskey is not given but, assuming that this barrel contained thirty gallons, this would make the total weight of these eleven barrels of whiskey 3700 pounds, exclusive of the barrels. As the entire shipment weighed only 4000 pounds and this shipment included twenty-four barrels of whiskey, two show cases, one cash register and five chairs, there is no doubt whatever but that the barrels were nearly emptied of their liquor before Black moved to Long Beach. The eleven barrels of whiskey above mentioned account for the entire weight of the shipment; this leaves thirteen barrels partly filled, two show cases, one cash register and five chairs unaccounted for as to weight.

It will be remembered that Black testified the barrel of 1899 Old Crow whiskey above mentioned was untapped at the time of the fire and that the two barrels of Green River whiskey were also untapped. It was the theory of the Insurance Company at the trial of the case that the alleged inventories produced by Black and Kayler and claimed to have been taken by them in May, 1912, were fake inventories and were made up merely for the purpose of defrauding the Insurance Company, after the

property was burned, and the evidence strongly supports that theory. There seems little doubt but that the alleged inventory was, at the time it was made up, intended to be made a part of a proof of loss, instead of being made up for the purpose of a proposed sale of the stock. In view of the weight of the shipment from Ilwaco to Long Beach can there be any doubt that the railroad's description of the 24 barrels as "only part full" was correct?

The first witness called by Mr. Black (S. A. Madge), testified that nearly every barrel of Black's whiskey was tapped. The following quotation is taken from his testimony. (Transcript, p. 71.)

"It was in barrels and the barrels were racked up, and the barrels were all tapped, and I tested quite a bit of it, because I felt it was my duty to do so."

In addition to the testimony, the uncontradicted evidence of several witnesses, shows that the reputation of Henry Kayler and William Black for truth and veracity is poor in the community in which they lived.

William S. Shagren, deputy assessor for Pacific County, Washington, made an assessment on Black's stock of liquors in March, 1912, and testified for the defense at the trial that Black stated at the time of the assessment that he was afraid the place was going dry and that he was letting his stock run down. The property at that time was valued at $600, which amount was agreed between the deputy assessor and Black to be a fair value. That he was assessing personal property at that time at 60 per cent, the $600.00 however represented full 100 per cent valuation. (Transcript, pp. 285 and 287.) The

tax statement was subscribed and sworn to by Black on the 13th day of March, 1912, and sets forth that the stock, furniture of sample rooms, saloon, etc., was $600.00. (Transcript pp. 282-283.)

Z. B. Brown, assessor for Pacific County, Washington, testified that he had a conversation with Black in March, 1912, and that Black gave him to understand that he had given a fair assessment and that his stock was low. (Transcript pp. 280-281.) That $600.00 valuation was supposed to be a fair valuation of the property and the deduction of 40 per cent was made by the assessor.

In addition to this, the evidence disclosed that Black's sales between the assessment and the date of the fire exceeded his purchases. In 1910 he placed a total valuation on his stock of $1600.00.

In case of the destruction of a stock of goods by fire, knowledge of the amount of loss lies entirely within the breast of the insured, and the law requires that he shall be fair, frank and honest with the insurer respecting the amount and extent of his loss.

Even though the terms of the policy did not provide that false swearing should render the policy void, public policy requires that the insured should be honest in his proof of loss. As stated by the Supreme Court of the State of Washington, in the case of *Pencil v. Home Insurance Company,* 28 Pac. 1034:

"It is beyond question that aside from the terms of insurance contracts, public policy requires that every person whose property which has been covered by insurance is destroyed, shall be frank, open and honest with the insurer or lose all benefits of his contract."

There can be no other conclusion drawn from the evidence in this case but that Black's proof of loss is permeated with fraud in every particular, and that he swore falsely regarding every material matter connected with his case. Public policy, as well as private justice, demands the application of the rules of law against false swearing and fraud in this case. Public policy demands that fraud and false swearing should not be rewarded, with a money judgment.

The evidence in the case indicates that at the time the property was burned Black's license was about to expire; he had recently increased the amount of his insurance; and the building was unlocked at the time of the fire. The only testimony given by Black regarding the cause of the fire was that it was his opinion that his property was burned by his enemies. (Transcript, p. 220.)

The motion for directed verdict should have been sustained. (Assignment of Error X.)

THE AMOUNT OF THE POLICY IS NOT EVEN PRIMA FACIE EVIDENCE OF THE AMOUNT OF THE LOSS.

Lyon Fire Insurance Co. v. Starr, 71 Tex. 733; 12 S. W. 45.

At the conclusion of the trial, upon request of the plaintiff, the court instructed the jury as follows:

"It is provided by the statute of the State of Washingtgon (Sec. 105, Laws of 1911, p. 243), as follows:

" 'Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire

insurance policy covering on any building or property or interests therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurance value of the building or property or interest therein at the time such insurance is affected.' Under this provision of the law I charge you that the defendant insurance company was presumed to know at the time it issued this policy of insurance in the sum of $5000.00 covering the property described in said policy, and situated in the buildings described in said policy, the value of said property. If it now claims otherwise the burden of proof rests with the defendant to so show by a fair preponderance of the evidence."

The foregoing instruction was clearly misleading and confusing to the jury and calculated to create in their minds the presumption that the amount of the policy was the amount of plaintiff's loss, and that the burden of proof was upon the defendant to show that the property was not worth $5000.00.

The first sentence of the above charge was taken from Sec. 105, Session Laws of Washington, 1911, and was intended to apply, as a rule, of evidence in a criminal action against the insurer or insured in a prosecution for over-insurance, but can have no connection with a civil action to recover under an insurance policy, as the measure of damages for personal property still remains the value of the property at the time of the loss. This rule is not denied by counsel for defendant in error and the court so instructed the jury. Sec. 105, out of which a portion of the above charge is taken, reads as follows in full:

"Every insurer who makes insurance upon any

building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interest therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurable value of such building or property or interest therein at the time such insurance is effected. Any insurer who knowingly makes insurance on any building or property or interest therein against loss or damage by fire in excess of the insurable value thereof, shall be fined in a sum not less than fifty dollars nor more than one hundred dollars. Any agent who knowingly effects insurance on a building or property or interest therein in excess of the insurable value thereof, shall be fined not less than fifteen nor more than twenty-five dollars. Any person or party who knowingly procures insurance against loss or damage by fire on any building or property or interest therein owned by him in excess of its insurable value shall be fined in a sum not less than twenty-five dollars nor more than one hundred dollars."

Inasmuch as the date of the fire was only about seven days from the delivery of the policy, the above instruction practically directed a verdict in favor of the plaintiff, and in view of the fact that the verdict is an extraordinary one and was returned in the face of conclusive evidence against the plaintiff, it is very likely that the above instruction given by the court very decisively affected the jury. The instruction has no place whatever in a civil action and was very confusing to the jury, to say the least.

It may be contended by defendant in error that

plaintiff's exceptions to the instructions given by the court to the jury, and the exceptions to the refusal of the court to give certain instructions requested by the defendant, should not be considered because the exceptions should be taken in the presence of the jury. The record indicates that the jury retired upon the conclusion of the court's charge; that immediately upon the conclusion of the charge exceptions were taken by counsel for the insurance company; that immediately after the conclusion of said exceptions the court recalled the jury before they had commenced to deliberate upon their verdict, and gave them further instructions. The reason for the rule for exceptions to instructions to be taken before the jury retires is to allow the court an opportunity to correct or modify his instructions. The fact that the court allowed the exceptions in the present case shows that he was satisfied with the instructions given and would not make any change therein, and inasmuch as the court had an opportunity to correct his instructions, after exceptions thereto were taken, before the jury retired to consider of their verdict, the reason of the rule is complied with. There was in effect at the trial of the action certain printed rules regarding exceptions to a charge, which appears by the certificate of the district judge. (Transcript, p. 503.) Rule No. 58 of the Printed Rules of Practice of said court provides that exceptions to a charge "may be taken by any party by stating to the court, after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, etc." It would seem in the present case that the plaintiff in error having complied with the printed rules of the court, which prevent

the taking of exceptions to instructions until the jury have retired, and the further fact that the court had every opportunity to make corrections before the jury retired to consider of their verdict, and that he was satisfied to allow the exceptions to the instructions rather than make any corrections, should not prevent the plaintiff in error from having the court's instructions reviewed in the present case, as the reason for the rule had been fulfilled. Nor should plaintiff in error be denied the right of review for following the printed rules of the court.

The Supreme Court of the United States in the case of *Gandia v. Pettingill,* 222 U. S. 452, held that exceptions taken to instructions under circumstances similar to the case at bar, would be sufficient although the better practice would be to take exceptions before the jury retired. Justice Holmes, in passing upon the point used the following language:

"Exception was taken to the judge sending the jury out before counsel for the defendant had stated all of his exceptions to the charge. The judge had told the counsel that he would not instruct otherwise than as he had and he allowed all exceptions to be taken in open court after the jury had retired. No doubt it is stricter practice to note exceptions before the jury retires (the judge, of course, having the power to prevent counsel from making it an opportunity for a last word to them). In this case they were noted at the trial in open court and in the circumstances stated the defendant suffered no wrong, so that we should not sustain an exception upon this ground."

The same reasoning applied by the Supreme Court applies to the case at bar. The district judge

had an opportunity to correct his instructions had he so desired, but instead stated that he would allow exceptions, thereby stating in substance that he was satisfied with the instructions given, and it seems to us that to hold under the present circumstances that the exceptions to instructions taken by plaintiff in error are not sufficient to present the matter for review, would be placing form above substance. The responsibility for sending a jury out before exceptions can be taken should not fall upon a litigant.

THE VERDICT WAS CONTRARY TO LAW AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT AND THE MOTION FOR A NEW TRIAL SHOULD HAVE BEEN ALLOWED BY THE COURT.

In denying the motion for a new trial the District Court said he was inclined to believe that the verdict was excessive, but that if the insurance company had selected an agent as bad as they claimed Henry Kayler to be, they must expect to suffer some embarrassment by reason thereof. In answer to that we will state that the insurance company knew nothing about the relations of Henry Kayler with Black until the trial; had they known what kind of a man he was they would certainly not have selected him as their agent at Long Beach. The court instructed the jury that if Black was guilty of false swearing in connection with his loss, that he could not recover even though the amount of the loss exceeded the amount of the policy. (Transcript, p. 420.)

That Black was guilty of false swearing in connection with the different items of his stock and also of the entire stock as a whole was conclusively

proven, and the verdict was against the instructions and contrary to law.

The size of the room where the case goods were stored was shown by the undisputed testimony to be 12x15x10 feet high and it was impossible for Black to have had the amount of stock in the saloon which he claimed. The verdict being contrary to law, opposed to the instructions of the court, unsupported by sufficient evidence as to the value of the property, and against conclusive evidence of false swearing, the verdict and judgment should have been set aside by the court.

In instructing the jury relative to the production of inventory, bills of purchase, etc, the court said:

"If there is nothing more in the case than the request in those letters, then his failure to produce copies would not defeat his action, because they did not ask him to produce them at any particular place in those letters."

It will be remembered that the answer admits the demand for inventory and bills of purchases, and endeavors to meet the same by saying that Black produced all in his power. Moreover, Black stated in his letter that he would not produce any bills, or papers or perform any of the conditions or terms of the policy on his part to be performed. Therefore, the court's instruction that if there was nothing more than the request in those letters, was not proper under the pleadings and evidence. The facts in regard to the production of invoices, bills of purchase, and the refusal to perform the conditions subsequent on the part of Black being admitted, the question became one of law, and the court should have set aside the verdict and judgment.

Nor was there any proper evidence as to the market value of the property.

If the verdict of the jury is against the weight of evidence or unsupported by the evidence, it is the duty of the court to set aside the judgment and grant a new trial.

Heddin v. Iselin, 142 U. S. 676.

Pleasants v. Fant, 22 Wall. 120.

Assignment of Error XIII.

WHERE THE INSURED PLACES AN EXCESSIVE VALUATION ON HIS PROPERTY OR ON SINGLE PORTIONS THEREOF, AND SUCH EXCESSIVE CLAIM WAS MADE CARELESSLY OR NEGLIGENTLY, THIS CONSTITUTES FRAUD AND FALSE SWEARING THE SAME AS IF THE CLAIM WAS WILFULLY MADE, AND THE INSURANCE COMPANY'S REQUESTED INSTRUCTION, AS FOLLOWS, SHOULD HAVE BEEN GIVEN.

"If you find from the evidence that the plaintiff in his sworn proof of loss, placed an excessive valuation on the whole property burned, or on single portions or quantities thereof, and that such excessive claim was willfully or carelessly made, then your verdict should be for the defendant."

The insured has no right to place a careless or negligent valuation on his property where the means of knowledge are at hand, for obtaining accurate information.

IT IS THE DUTY OF THE COURT TO IN-

STRUCT THE JURY UPON THE MATERIAL ISSUES OF THE CASE. THE COURT DID NOT INSTRUCT THE JURY THAT IF THE PROPERTY WAS DESTROYED BY THE ACT, PROCUREMENT OR DESIGN OF THE PLAINTIFF THEY SHOULD RETURN A VERDICT IN FAVOR OF DEFENDANT. THIS WAS ONE OF THE MAIN ISSUES IN THE CASE AND THE JURY SHOULD HAVE BEEN INSTRUCTED ON THAT POINT.

THE DISTRICT COURT GAVE JUDGMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT FOR FIVE THOUSAND DOLLARS WITH INTEREST THEREON AT SIX PER CENT. PER ANNUM FROM THE 6TH DAY OF DECEMBER, 1912, ALTHOUGH NO INTEREST WAS PRAYED FOR IN THE COMPLAINT, AND THE COMPLAINT CONTAINED NO ALLEGATION WHATEVER IN REGARD TO INTEREST.

Assignments of Error 11 and 12.

We believe that a careful examination of the evidence submitted in this case conclusively shows that the loss was not an honest one, and that there was not sufficient evidence to sustain the verdict for five thousand dollars.

We respectfully submit that the judgment of the District Court should be reversed on account of the errors assigned, and the action dismissed.

Cole & Cole,

Attorneys for Plaintiff in Error.